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Supreme Court of the United States

No. 44. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PETITIONER.

January 2, 1940.

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The principal contentions made by this respondent are, we believe, adequately disposed of by our main briefs in the present case and the *Berwind-White* case and our reply brief in that case, copies of which have been furnished to counsel for the respondent.

As for the respondent's contentions that the tax violates the exports or imports clause or that it imposes an undue burden on foreign commerce, we do not propose to debate those issues. They were expressly waived and abandoned below and cannot, therefore, now be raised in this Court.

We propose here to deal only with additional arguments raised by counsel in the instant case.

POINT I.

The opinion of the Court of Appeals does not constitute findings of fact; nothing contained in the opinion concerning the nature of the transactions taxed is binding on this Court.

A considerable portion of respondent's brief is predicated upon the assumption that the Court of Appeals in its opinion made certain findings of fact relative to the business methods involved in respondent's purchases and that such findings of fact are binding on this Court.

In the first place, under New York practice, statements by the Court in opinions do not constitute findings of fact. When findings of fact are made, they are embodied in the formal decision of the Court. The opinions are merely the *ratio decidendi*, constitute no part of the decision, and embrace no findings.

Second, it is obvious that the Court in stating its view of the case was not attempting to resolve conflicting issues of fact. There were no real factual issues as to the business procedures followed by the respondent and its vendor. The only problem considered by the Court was the proper characterization of the undisputed facts in the light of its views as to the principles enunciated in the *Wiloil* and other cases. Certainly, there was no pure question of fact. At most, the Court was confronted with a mixed question of fact and law.

We do not quarrel with the respondent's contention (Br., pp. 10-12) that this Court "has no jurisdiction to revise the decision of the highest court of a state *upon a pure question of fact.*" (Italics ours.) However, it is

well settled that this Court will review even findings of fact by a State court where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts (*First National Bank of Hartford* v. *City of Hartford*, 273 U. S. 548, 552 [1927]; *Northern Pacific Railway Company* v. *North Dakota*, 236 U. S. 585, 593 [1915]).

We believe that all the Court of Appeals intended to do was to apply its views as to the *Wiloil* and other cases to the undisputed facts at bar. And one of the assignments of error in this case is precisely that the Court of Appeals erred in interpreting and applying those cases to the facts at bar.

POINT II.

The respondent has shown no ground for distinguishing the California use tax cases from the case at bar.

The respondent asserts that we have misread the *Southern Pacific* case and points out that the railroad company acquired both title to and possession of the goods in other States, and brought them into California on its own waybills (Resp. Br., p. 22). Although it is true that the goods taxed were shipped into California on the taxpayer's railroad without transportation charge, it is not at all clear either from either the opinion (306 U. S., at p. 173) or the record on appeal that the railroad took title to or possession of the goods, other than as a common carrier, until after they had arrived in California (R., Stip. of Facts, Pars. 34, 35, 36, 37, pp. 113-115). In any

event, this fact is of no importance to the contention we make, for the Court held that it was the "retention and exercise of a right of ownership, respectively," in California, which took place after the interstate shipment had ended and before the consumption in interstate commerce had begun that subjected the transaction to tax. Similarly, in our case it is the taking of possession and title after the interstate shipment has ended and before the consumption in foreign commerce has begun which subjects the transaction to tax. The identity of the two factual situations is unmistakable.

If, however, delivery to the purchaser within the State is essential in order to present a factual situation precisely identical with the California cases, we need only refer to *Pacific Telephone & Telegraph Co.* v. *Gallagher* (306 U. S. 182 [1939]), decided the same day as the *Southern Pacific* case. In that case, the facts of which as applied to an interstate telephone and telegraph company are virtually identical with those in the *Southern Pacific* case, the goods were shipped by the vendor to the taxpayer in California (R., Stip. of Facts, Pars. 3, 17, 23, pp. 63, 70, 73). Indeed, the purchaser-plaintiff in that case receives the "goods at the dock or breaks the seal of the railroad car, as the case may be, and plaintiff's employees unload the goods directly from the dock or car into the [its own] trucks" (R., Stip. of Facts, Par. 17, p. 70).

In upholding the tax, the Court said:

> "The appellant exercises two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material

distinction between the contentions of the appellant and those disposed of in *Southern Pacific Co.* v. *Gallagher, ante,* p. 167."

We think it irrefutable that the "exercise of any right or power * * * incident to the ownership" taxed in the *Pacific Telephone & Telegraph* case is identical with the transfer of title and possession taxed by the statute at bar, and that in both cases it is the taking of possession and dominion over the goods after their interstate journey has ended and before their use in interstate or foreign commerce has begun, which subjects the transaction to tax.

POINT III.

The proceedings below relating to the New York City Personal Property Tax have no bearing on the respondent's liability for the tax at bar.

The respondent states that if we are correct in our contention that the tax at bar is identical with the California use tax, we are "completely out of court" (Resp. Br., p. 25). Counsel contend that the New York City personal property tax has been held to be a use tax; and since the Appellate Division below held that the oil at bar was not subject to the personal property tax and the petitioner failed to appeal from that decision, it follows that we cannot here contend that the sales tax is identical with the California so-called use tax.

This contention is entirely without merit. We contended in the State courts and we contend before this Court that the purchases at bar are subject to tax under the New York City sales tax law. Our contention as to the applicability of the sales tax law was upheld by the

Court of Appeals, since it nullified the assessment solely on constitutional grounds (R. 307). Because the validity of the personal property tax had not yet been passed upon by the State courts and because we did not desire to test the constitutionality of that tax in a case complicated by other factors, we did not contend in the Court of Appeals that the respondent was subject to the personal property tax. But we do not see how that weakens in the slightest our position that the purchases at bar are subject to the sales tax or that the sales tax is identical in terms and effect with the California taxes denominated use taxes. We are in no sense relying upon the New York City personal property tax to sustain the tax at bar. For that reason any holding of the Appellate Division as to the applicability of that tax to the oil at bar is entirely irrelevant to this case.

POINT IV.

The respondent cannot now raise constitutional questions abandoned in the State courts; there is no basis for remanding the case for the consideration of such questions.

(1)

In addition to its contentions based upon the fact that the oil is delivered to it from outside sources of supply, respondent now seeks to argue (1) that the use of the oil to propel the respondent's ships in foreign commerce renders the tax invalid as a burden thereon; (2) that the tax on the oil delivered to the French Line's ships to be used as fuel is a tax on an "export"; and (3) that the storage of the imported oil in a bonded warehouse renders

the purchase immune from tax (Resp. Br., Points III and IV).[1]

Anticipating objection on the score that these contentions were waived and abandoned in the Appellate Division and Court of Appeals, and for that reason not considered by those courts, the respondent seeks to defend its right to have this Court review these questions in the present proceeding (Resp. Br., Point V). However, the fact of intentional waiver and abandonment is entirely clear.

In its reply brief in the Appellate Division, the French Line stated (Reply Br., p. 3):

> "The Court need give no attention to any part of Point I of respondent's [the Comptroller's] brief * * *".

In the Point I referred to, the Comptroller had addressed himself to the precise three questions which the respondent is now seeking to revive here and which are summarized above.

In view of the respondent's abandonment of these points in the Appellate Division, when the case came up in the Court of Appeals, the Comptroller stated (Br., p. 9):

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[1]Respondent also intimates (Br., p. 14), although it does not argue, that the oil was not acquired in New York City but, upon being pumped into the ship, acquired "the situs of the ship which was, as a matter of law, France." Of course, there is nothing to such a position. *Cunard Steamship Co. v. Mellon*, 262 U. S. 100 (1923); *Scharrenberg* v. *Dollar S. S. Co.*, 245 U. S. 122, 1917; *In re Ross*, 140 U. S. 453 (1891). Any contention that transfer of title and possession did not take place in New York City is precluded by the determination of the Court of Appeals that the tax was invalid on grounds solely of federal law (R. 307). The tax would be valid under the sales tax law only if transfer of title and possession took place "within the City of New York" (Local Law 20 of 1934, as amended, §§1, 2).

> "As these points were not pressed by the respondent in the Court below (Petitioner's Reply Brief Below, pp. 3-4), we shall not refer to them further in this brief."

Similarly, the French Line, in its Court of Appeals brief, limited its contentions as follows (p. 3):

> "The issues of law to be decided are (1) Whether the sales and deliveries in suit are transactions in interstate commerce, (2) If so, whether the tax imposed is invalid as constituting a burden upon such commerce."

Accordingly, both sides refrained from making any argument on the points in question before the Court of Appeals, and that Court, of course, did not consider them in deciding the case. In its opinion, it stated (R. 302-304) that the question was the same as that involved in the companion case in that Court, *Matter of Sears, Roebuck & Co.* v. *McGoldrick* (279 N. Y. 184 [1938]), which was an ordinary case of a vendor selling goods shipped across State lines.

There can be no doubt, therefore, that the respondent deliberately waived and abandoned the points in question and for that reason it was not considered by the State court, and is not an issue in the case.

Accordingly, it is hardly necessary to cite *New York ex rel. Cohn* v. *Graves* (300 U. S. 308 [1937]), and numerous other cases holding that: "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there; whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented."

(2)

The respondent now suggests the possibility of a remand to the Court of Appeals for a further consideration of these questions in the event this Court should decline to consider them. However, since the waiver and abandonment were deliberate, there is no basis for such a request. It is not now open to respondent to ask the State court to consider a federal ground which it expressly waived, and thereby induced the State court not to consider. That issue is foreclosed in the State court by respondent's abandonment. For that reason a remand to the Court of Appeals could serve no useful purpose.

(3)

If, despite the waiver and abandonment, the points in question are resuscitated, in lieu of any extended treatment of them in this case, we respectfully refer the Court to their full treatment in POINTS I and III of our main brief in the companion *Gulf Oil Company* case, No. 473.

In that brief we show, among other things, that the subsequent use of the oil in propelling a vessel in foreign commerce cannot render invalid a tax on the *prior* sale; that oil delivered to a ship to be consumed as fuel is not an export; and that the prior storage of the imported oil in a bonded warehouse does not render invalid a tax on the *subsequent* sale.

Conclusion.

The final order and judgment should be reversed and petitioner's determination confirmed.

January 2, 1940.

Respectfully submitted,

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